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No. 99-1792

IN THE
SUPREME COURT OF THE UNITED STATES

DIRECTOR OF REVENUE,
Petitioner,

v.

COBANK ACB, AS SUCCESSOR TO THE
NATIONAL BANK FOR COOPERATIVES,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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Brief of *Amicus Curiae* Multistate Tax Commission In Support of Petitioner

The Multistate Tax Commission ("MTC") submits this brief as *amicus curiae* in support of the Petitioner in accordance with the provisions of Rule 37.3 of the Supreme Court Rules.[1]

INTEREST OF AMICUS CURIAE

The MTC is the administrative agency created by the Multistate Tax Compact ("COMPACT"). *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 751 (1995). Twenty-one States have legislatively established full

[1]No counsel for any party authored this brief in whole or in part. Only *Amicus* MTC and its members States made any monetary contribution to the preparation or submission of this brief. Consent of all parties to the filing of this brief is filed herewith.

membership in the COMPACT. In addition, two States are sovereignty members and nineteen States are associate members.[2] This Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

The COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax systems following the findings and recommendations of the Willis Committee.[3] *See* D. Brunori, *Interview: Gene Corrigan, a 'Proud Parent' of the MTC*, STATE TAX NOTES, Nov. 15, 1999, at 219. Specifically, the COMPACT aspired to achieve better order in state tax systems as applied to multijurisdictional commerce. In responding to the intense criticisms of state taxation of interstate commerce, the COMPACT sought to avoid congressional regulation and preemption by federal

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[2] Compact Members: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. Sovereignty Members: Florida and Wyoming. Associate Members: Arizona, Connecticut, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Wisconsin, and West Virginia.

[3] The Willis Committee, a congressional study of state taxation mandated by TITLE II OF PUB. L. NO. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate state taxation of interstate and foreign commerce. *See generally Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills Before Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966).

elected representatives who did not have any political stake in maintaining state revenues to support essential state services.

The issue presented here is of great concern to the MTC. This case seeks a methodology for discerning possible tax exemptions arising from actions or omissions of Congress that balance enumerated congressional powers with state tax sovereignty, a reserved right necessary to the effective functioning of the States within our federal union. While Congress has authority to regulate and preempt state taxation in several circumstances, the MTC seeks clear statements in those matters affecting the sensitive balance between the Federal Government and the States. The MTC works to resolve ambiguities over tax obligations flowing from statements by Congress or other federal institutions of competent authority. Such ambiguities have the potential to undermine state taxation. In this instance, uncertainty has enabled a specialized privately-owned financial institution to seek a unique tax advantage over other financial institutions with which it competes. The adversely affected competitors inevitably and accurately view the unique treatment as unfair, resulting in greater frustration with state tax systems in general.

The MTC's interest here is particularly acute because Respondent argues that the National Bank for Cooperatives ("NBC") was imbued with an absolute state tax exemption based on implied immunity in the face of a history of contraindications in long-standing congressional legislation. The exemption appears to have no policy basis. Respondent's automatous analysis ignores the Court's long-established recognition that the political process op-

erates within our federal system as a vital element in preserving the Union. The analysis also undeservedly denigrates the willingness of Congress to discharge its institutional responsibility to express its true intent with regard to state tax immunity of bodies associated with the Federal Government in one or more aspects.

SUMMARY OF ARGUMENT

1. The question on which the Court granted certiorari is whether 12 U.S.C. § 2134 authorizes Missouri to tax Respondent's income. Under customary canons of statutory construction, the statute's express exemption of certain items from tax—notes, debentures, bonds, and other obligations of the NBC—necessarily shows that Congress intended to permit other state taxes imposed on these entities. *Expressio unius est exclusio alterius.*

The statutory history of these tax exemptions confirms Congress' intention to permit other taxes. From the first establishment of the banks for cooperatives (predecessors of the NBC) Congress prescribed precisely how they were to be treated for tax purposes. Notes, debentures, and bonds were, and still are, exempted from state tax. A second, broader exemption covered the banks, their property, and their income, but only so long as the Federal Government retained any ownership interest. After the anticipated federal divestiture, the broader exemption was rendered inoperative by a statutory exception. By 1968, divestiture was complete, the broad statutory exemption nullified, and state income taxation upheld. Congress approved this result, as it carried these provisions forward into the Farm Credit Act of 1971.

The legislative history of the Farm Credit Amendments Act of 1985, PUB. L. 99-205, 99 STAT. 1678, also confirms Congress' intent to continue unchanged the tax status of Respondent. Congress removed both the broad statutory exemption and the nullifying exception because functionally they had become self-canceling surplusage. The other changes made to the Act, as well as the legislative history describing the removal of the tax provisions as technical and conforming amendment, made absolutely clear that Congress did not intend any substantive change in how these farm credit entities were to be treated for state tax purpose. Indeed, Respondent continued paying tax through 1994.

2. The Court below held that (a) Respondent's status as a federal instrumentality combined with (b) the absence of explicit affirmative authorization to tax after the repeal of the exemption and the exception (c) resurrected the implied constitutional immunity of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). All three aspects of the holding are suspect.

First, the NBC is not the kind of federal instrumentality that invokes the implied constitutional immunity of *McCulloch*. It would not be considered a federal instrumentality were it not so labeled. Congressional labeling of a federal entity no longer necessarily controls its status for all purposes. *Lebron* v. *National Railroad Passenger Corporation*, 513 U.S. 374 (1995).

Second, the implied immunity of *McCulloch* is superceded when Congress specifies the extent of immunity it intends for the federal entities it creates. The immunity is implied only to protect federal

entities when Congress is silent. When Congress acts to provide the immunity it believes necessary, continuing the implied immunity leads to precisely the unintended and incorrect results embodied in the decision below.

Finally, no special phraseology of explicit affirmative authorization for States to tax is required. This Court's decisions on state taxation of federal instrumentalities show that the normal application of the tools of statutory construction dictates the interpretation of 12 U.S.C § 2134.

ARGUMENT

1. CONGRESS HAS ALWAYS INTENDED THAT THESE FARM CREDIT BANKS BE SUBJECT TO STATE INCOME TAX WHEN PRIVATELY OWNED.

From their first creation in 1933, the NBC's predecessor banks for cooperatives were exempt *by statute* from state income taxes, but only so long as they had federal ownership. Congress effected this result through a broad statutory exemption for the banks, their property, and their income, followed by a statutory exception limiting the exemption to those years when the Federal Government held stock in the bank. PUB. L. No. 73-75, § 63, 48 STAT. at 267 (1933); PUB. L. No. 92-181, § 3.13, 85 STAT. at 608 (1971). By the 1960s the Federal Government had fully divested itself of all ownership interest in the farm credit entities. The exception had swallowed the exemption, rendering it inoperative. Courts uniformly upheld state taxation of these privately owned farm credit banks. *See Baker Prod. Credit Ass'n* v. *State Tax Comm'n*, 421 P.2d 984, 985

(Or. 1966, *en banc*); *Woodland Prod. Credit Ass'n* v. *Franchise Tax Bd.*, 37 Cal. Rptr. 231, 233 (Ct. App. 1964); *Montana Livestock Prod. Credit Ass'n* v. *State*, 393 P.2d 50, 53 (Mont. 1964); *Columbus Prod. Credit Ass'n* v. *Bowers*, 180 N.E.2d 1, *cert. denied*, 371 U.S. 826 (1962).

In the Farm Credit Amendments Act of 1985 Congress deleted the exemption along with the nullifying exception as surplusage in Section 205 styled technical and conforming amendments. By repealing the self-canceling exemption and exception, Congress intended no change in the authority of States to tax these farm credit banks. That intent is shown by several factors. First, a simple examination of the language of the two repealed sentences reveals that they no longer accomplished anything and could be omitted without substantive effect. Second, there is no basis textually and no legislative history that so much as hints at any intended tax change. Third, if Congress did intend a complete about-face—suddenly exempting these privately-owned entities from state tax—it surely makes no sense to do so by the subtle indirection of resurrected implied constitutional immunity rather than simply by leaving the existing, explicit statutory exemption in place and repealing only the exception. Conversely, if Congress did indeed intend to rely on the implied constitutional immunity of *McCulloch* for the first time with these entities by repealing the exemption and exception, then it makes no sense to retain the superfluous *statutory* exemption from state tax for obligations of the banks. *See Pennsylvania Dept. of Public Welfare* v. *Davenport*, 459 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same

enactment."); *Platt* v. *Union Pacific RR Co.*, 99 U.S. 48, 58 (1878) ("But the admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words."). Finally, imparting broad immunity to these farm credit banks is totally inconsistent with a primary purpose of these 1985 amendments to the farm credit system to make the privately owned banks even more independent of federal government management.

Congress has specified in 12 U.S.C. § 2134 the degree of immunity it thinks appropriate by providing an exemption only for the notes, debentures, bonds, and other obligations of the NBC. From the language of the statute, from the interpretive principle of *expressio unius est exclusio alterius*, and from the history of the legislation and the legislative history, it is thoroughly clear that Congress intended to limit the exemption from state tax to that currently expressed in 12 U.S.C. § 2134. Section 2134 thus authorizes Missouri's income tax.

2. COURT PRECEDENT DOES NOT SUPPORT ALL-ENCOMPASSING STATE TAX EXEMPTION FOR FEDERAL INSTRUMENTALITIES; STATE TAX EXEMPTIONS ULTIMATELY REST ON INTENT OF CONGRESS.

The decision below relies on the theory that (a) Respondent's status as a federal instrumentality combined with (b) the absence of explicit affirmative authorization to tax after the 1985 repeal of the exemption and exception (c) resurrected the implied constitutional immunity from state tax derived from *McCulloch*. But all three elements of that decision are unfounded.

A. Respondent Is Not The Kind of Federal Instrumentality That Triggers Immunity.

Respondent and the statutorily similar production credit associations are not the kinds of federal instrumentalities that trigger the implied immunity of *McCulloch*. The number and variety of federal agencies, instrumentalities, and corporations has grown enormously over the last 70 years. No longer is it a simple yes-or-no question to determine whether a particular government corporation is part of the Federal Government and whether it has sovereign immunity, tax immunity, or various other kinds of immunities available to the Government (*e.g.* from jury trials). Congress has created corporations like Comsat and Amtrak "specifically designed not to be agencies or establishments of the United States Government," *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 390 (1995), but not entirely divorced from the Government either. Just which attributes of federal identity these corporations retain has become an increasingly nuanced decision. No longer does the Court accept the label applied by Congress as controlling in all cases. *Id.* at 394 (Amtrak sufficiently connected to the Federal Government to have First Amendment responsibilities even though not a federal instrumentality).

Admittedly, these farm credit banks enjoy a formal and undoubted designation as federal instrumentalities. Nevertheless, they are crucially different from the kind of entity that this Court has found to be a federal instrumentality in the absence of such designation, particularly in light of their private ownership and commercial purpose. Indeed, this Court has already acknowledged that production

credit associations are privately owned banks that fulfill a commercial, rather than a governmental role:

> The PCA's' business is making commercial loans, and all their stock is owned by private entities. Their interests are not coterminous with those of the Government any more than most commercial interests. Despite their formal and undoubted designation as instrumentalities of the United States, and despite their entitlement to those tax immunities accorded by the explicit statutory mandate, PCA's do not have or exercise power analogous to that of the NLRB or any of the departments or regulatory agencies of the United States.

Arkansas v. *Farm Credit Services of Central Arkansas*, 520 U.S. 821, 831-32 (1997). *See also Hanna* v. *Federal Land Bank Ass'n of Southern Illinois*, 903 F.2d 1159, 1162 (7th Cir. 1990) (farm credit banks "are private employers without sufficient governmental involvement to constitute federal agencies exempt from jury trials in actions brought under the ADEA.").

The Court in *Farm Credit Services* found that the production credit association was not sufficiently connected to the Government to trigger an exemption from the Tax Injunction Act. There appears to be no basis to suggest that a lower threshold of governmental connection should trigger the implied immunity from *McCulloch*.

B. *McCulloch* Implied Immunity Is Superceded When Congress Has Acted.

Historical currents help understand the development and parameters of the implied immunity doctrine of *McCulloch v. Maryland*. That decision grew from the early battles for federalism. In those early years the nascent Federal Government was fighting for its very existence against the markedly more entrenched and established power of the States. *See, e.g.*, Jefferson's and Madison's roles in drafting the Kentucky and Virginia Resolutions. GARRY WILLS, A NECESSARY EVIL, 134-152 (1999). Failure of the central government to achieve sustainable authority had doomed the earlier Articles of Confederacy. Thus, when Chief Justice Marshall rode to the defense of the Second Bank of the United States in 1819 against the discriminatory tax imposed by the State of Maryland, he wisely emphasized the importance of protecting federal instrumentalities from the destructive power of a state tax. That crucial early defense of a viable federalism in *McCulloch* lives today as a vital cornerstone of federal authority.

In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Court reaffirmed that the implied immunity from state tax needed no enactment from Congress to activate. Silence led to the presumption of immunity. Congress could, if it chose, specify the precise degree of immunity it believed appropriate for any particular federal instrumentality. *Id.* at 865-66.

In the last 175 years, the calibration of federal and state power has gradated toward ever-greater

federal hegemony. Reflecting that change, this Court substantially narrowed the intergovernmental immunity doctrine in the late 1930s. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Graves v. New York*, 306 U.S. 466 (1939). More recently, the interstate highway system and now the information superhighway have interlaced the country to such a great extent that the overwhelming preponderance of all commerce is "interstate commerce" and subject to federal control. *See United States* v. *Morrison*, 129 S.Ct. 1740, 1752-53 (2000). Power and money now flow to Washington directly, bypassing the States as less relevant on really important issues. *See Garcia v. San Antionio Metro. Transit Authority*, 469 U.S. 528, 566-67, n. 9, (1985) (Powell, J., dissenting) (discussing the current strength of the federal government over state government). Congress no longer displays any reluctance to strike the balance necessary to protect federal interests.

In legislation establishing various federal instrumentalities and corporations, Congress for some time has routinely specified to what extent such entities are exempt from state tax. Congress no longer rests tax immunity for its multitudinous federal instrumentalities on *McCulloch*'s implied immunity but rather resolves these issues in the enabling legislation. A review of legislation creating various federal entities shows the consistency with which Congress has specified in statute the desired degree of exemption from state tax.[4]

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[4] Rural Telephone Bank, 7 U.S.C. § 941(c); Federal Crop Insurance Corporation, 7 U.S.C. § 1511; Foreign Banking Corporations, 12 U.S.C. § 627; Federal Home Loan Banks, 12 U.S.C. § 1433; Financing Corporation, 12 U.S.C. § 1441(E)(7); Resolution Funding Corporation, 12 U.S.C. § 1441b(f)(7); Federal Home Loan Mortgage Corporation, 12 U.S.C. § 1452(e); Federal Savings and Loan Associations, 12 U.S.C. § 1464(h); National Mortgage Associations, 12 U.S.C. § 1723(c); Federal Credit Unions, 12 U.S.C. § 1768; Federal Deposit Insurance Corporation, 12 U.S.C. § 1825(a); Federal Land Bank Associations, 12 U.S.C. § 2098; Federal Financing Bank, 12 U.S.C. § 2290; Tennessee Valley Authority, 16 U.S.C. § 831l; Student Loan Marketing Association, 20 U.S.C. § 1087-2(b)(2); Overseas Private Investment Corporation, 22 U.S.C. § 2199(J); Legal Services Corporation, 42 U.S.C. § 2996b(c).

This change in the balance of power in the federal-state relationship renders appropriate here a strong affirmation that where Congress has specified what immunity from tax an entity carries, Supremacy Clause-based immunity is measured by that congressional enactment, not by a constitutional presumption. Such an affirmation would be consistent with this Court's statement about production credit associations referring to "their entitlement to those tax immunities accorded by the explicit statutory mandate." *Farm Credit Services*, 520 U.S. at 832. Immunity is implied, after all, to protect federal entities. When Congress acts to impart the protection it deems necessary, implied immunity is superceded as irrelevant. *See First Agricultural Nat. Bank* v. *State Tax Comm'n*, 392 U.S. 339, 341 (1968) ("Because of pertinent congressional legislation in the banking field, we find it unnecessary to reach the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities.").

This Court employs a similar constitutionally implied protection for federal interests in the absence of legislation with its commerce clause analysis. Where Congress has not otherwise acted, the dormant commerce clause restrains States from

regulating or taxing interstate commerce in certain ways. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). When Congress acts, however, the dormant commerce clause itself goes dormant; the only limits on state actions are those prescribed by congressional action. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982):

> Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action.

See also Wardair Canada v. *Florida Dept. Of Revenue*, 477 U.S. 1, 9 (1986) ("the Federal Government has affirmatively acted, rather than remained silent, with respect to the power of the States to tax aviation fuel, and thus . . . the case does not call for dormant Commerce Clause analysis at all."). The question thus becomes "What has Congress done?"

C. No Special Words of Explicit Affirmative Authorization To Tax Are Required.

Respondent argues that after the 1985 repeal of the exemption and exception from 12 U.S.C. § 2134 the remaining language in this tax exemption provision became inadequate to permit the States to tax its income. The lack of express affirmative authorization for the States to tax meant that *McCulloch*'s

implied immunity became controlling. Such a conclusion distorts this Court's intergovernmental immunity jurisprudence. When Congress acts to specify the immunity appropriate for a federal instrumentality, that expression of congressional will determine the extent of immunity the instrumentality carries. This Court has never held that Congress must affirmatively express its assent to state tax in any particular formulation of language. Such assent may be derived from legislation using standard statutory interpretation methods.

Curiously, neither the Farm Credit Act of 1933 nor the Farm Credit Act of 1971 *ever* contained such an express affirmative authorization for the States to impose income tax. They contained only an explicit *exemption* from state income tax and an *exception* that rendered that exemption a nullity upon federal divestiture, self-canceling provisions with *no* operative effect. If Respondent's theory were correct—that an express affirmative authorization to tax is required—then there never was such authorization. And yet, Respondent concedes it owed tax prior to 1985. Moreover, as noted above, courts uniformly approved the imposition of state income tax based on the compelling inference from the statutory language that Congress intended that these farm credit associations and banks be subject to tax upon divestiture. As discussed above in Section 1, the current language 12 U.S.C. § 2134 equally compels the conclusion that Congress intended to limit the tax exemption to those items specified in current statute.

Nevertheless, Respondent argues that current statutory language is somehow insufficiently worded to confine the tax exemption to those notes, bonds,

and debentures specifically mentioned. To support its argument Respondent has cited dicta in a number of cases suggesting that express affirmative authorization must be given. But an examination of those cases reveals that this Court has consistently used traditional canons of statutory construction to interpret Congress' tax exemptions and has never required exclusively explicit affirmative statutory authorization

Many of the cases on tax immunity for federal instrumentalities concerned national banks. Because Congress expressly authorized state taxation of real property belonging to the banks and shareholders' interest in the banks, the focus in many of these cases was on what was expressly allowed by Congress. Interestingly, even here the Court followed the statutory construction maxim *expressio unius est exclusio alterius*: from the authorization of certain state taxes the Court implied the exemption from others. *See First Agricultural Nat. Bank*, 392 U.S. at 343 (basing its decision solely on statute, this Court found "that 12 U.S.C. 548 was intended to prescribe the only ways in which the States can tax national banks.").

In *Austin* v. *Aldermen of Boston*, 74 U.S. 694, 699 (1869), the Court discussed the recently enacted statute permitting some state taxation of national banks and commented on the standard for waiver of immunity:

> [T]he waiver must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption.

The waiver there was express, but this Court said nothing about requiring an express waiver. It said only that what Congress intended to do must be "clear." This case is hardly precedent for requiring an express affirmative authorization.

In *Owensboro Nat. Bank* v. *City Of Owensboro*, 173 U.S. 664 (1899), in discussing the standard for determining the legality of the state tax, this Court noted as follows:

> [S]tates would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets, or franchises, were it not for the permissive legislation of congress.

Id. at 668. Again, although the legislative permission at issue was expressed affirmatively with regard to national banks, there is nothing in the decision requiring permission to be so expressed. It simply must be clear that Congress in exempting certain state taxes intended to permit others.

Most revealing is the language the *Owensboro* Court cited as authority for its quoted conclusion:

> National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates

> the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

Id. at 668 (quoting *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283 (1896)). In place of language establishing a requirement of express authorization we find familiar language of implied preemption standards looking to whether the state tax "conflicts" with federal law or "frustrates the purpose" of Congress' enactment.

In *Des Moines Nat. Bank* v. *Fairweather*, 263 U.S. 103 (1923), this Court also made a general statement sometimes cited as establishing a "requirement" for affirmative assent to tax:

> It is settled that the relation of the national banks to the United States and the purposes intended to be subserved by their creation are such that there can be no taxation, by or under state authority, of the banks, their property or the shares of their capital stock otherwise than in conformity with the terms and restrictions embodied in the assent given by Congress to such taxation.

Id. at 106. This unsurprising directive applicable to national banks does not require that assent must be in express *affirmative* terms so long as the assent is clear enough to enable States to conform.

A final case heavily relied upon by Respondent and the court below offers no support. In *United States* v. *Allegheny County*, 322 U.S. 174 (1944), the Court used language of express consent in dicta:

> But unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation.

Id. at 177. This Court concluded in the absence of *any legislation at all* about the authority of States to tax government property on a contractor's land that the tax must fail under implied constitutional immunity. No legislation meant *no* waiver of immunity. *Id.* at 189 ("We find no support for the claim that the immunity has been waived. Congress certainly has not done so."). Thus, the nature of what would constitute "congressional consent" was not even at issue because Congress did not act.

On the other hand, where Congress has legislated the extent of immunity it believed appropriate, this Court has employed traditional statutory interpretation methods to determine Congress' intent. This Court's discussion of tax immunity in *Pittman* v. *Home Owners' Loan Corp. of Washington, D.C.*, 308 U.S. 21 (1939), is particularly instructive. At issue was whether Baltimore could charge the normal mortgage recording fee to the Home Owners' Loan Corp., a federal instrumentality. This Court concluded the city could not under *Federal Land Bank* v. *Crosland*, 261 U.S. 374 (1923). The city had relied on the language of the Home Owners' Loan

Act that specified what immunity the Home Owners' Loan Corp. enjoyed to argue that these fees were not included within that immunity. This Court reviewed the language of the Act:

> That provides that the Home Owners' Loan Corporation, its franchise, capital, reserves and surplus, and its loans and income shall be exempt from all state or municipal taxes. The critical term, in the present relation, is 'loans'. We think that this term, in order to carry out the manifest purpose of the broad exemption, should be construed as covering the entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security.

308 U.S. at 31-32 (footnote omitted). Particularly interesting is that this Court looked to the *statutory exemption* to see if the taxed activity was included within that exemption. This Court did not rely on the obvious fact that there was no *statutory authorization* for mortgage recording fees. The unmistakable implication is that by specifying what was exempt from tax in statute, this Court concluded that Congress was granting permission to tax other activities not included in the exemption.

Express affirmative congressional authorization is not required by any direct holding of this Court, only by "potentially mischievous dictum" in Judge Loken's apt phrase. *Farm Credit Services of Central Arkansas,* v. *State of Arkansas*, 76 F.3d 961, 965 (8th Cir. 1996) (Loken, J. dissenting). Because the decision below relied on that incorrect standard, it must be reversed.

Conclusion

Respondent is advocating a position that runs counter to what Congress clearly intended in providing a specific tax exemption to these farm credit entities. Respondent's position also runs counter to what constitutional tax immunity this Court would normally imply for privately owned entities of the kind that the NBC has become serving commercial, rather than governmental, interests. *Amicus* suggests that a vibrant federalism requires a rejection of this unwarranted extension of the implied immunity of *McCulloch*. This Court should reverse the decision below and affirm the authority of States to tax the income of these farm credit banks.

Respectfully submitted,

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